

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



# 75-4257

## United States Court of Appeals

FOR THE SECOND CIRCUIT

ESTATE OF HERMAN KLEIN, DECEASED, and  
BEBE KLEIN, MALCOLM B. KLEIN and IRA K.  
KLEIN, EXECUTORS, and BEBE KLEIN, Individu-  
ally,

*Appellants,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,

*Appellee.*

On Appeal from a Decision of the  
United States Tax Court

### REPLY BRIEF FOR APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 75-4257

ESTATE OF HERMAN KLEIN, Deceased, BEBE KLEIN,  
MALCOLM B. KLEIN and IRA K. KLEIN, Executors,  
and BEBE KLEIN, Individually,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

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ON APPEAL FROM THE DECISION OF THE  
UNITED STATES TAX COURT

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REPLY BRIEF OF APPELLANTS

This Reply Brief is being submitted to answer three items contained in the Brief for the Appellee.

1. On pages seven and thirteen of that Brief, Appellee argues that Section 61(a)(13) and Section 702(c) of the Internal Revenue Code defines "gross income" of a partner to include gross receipts of a partnership. This fact is irrelevant since Section 6013(e)(1)(A) requires that the amount of "gross income stated in



the return" not "gross income defined under the Internal Revenue Code" be compared to determine if the omissions equal or exceed 25% of this figure. The construction argued for by Appellee will give no meaning to the phrase "stated in the return". The Internal Revenue Code defines "gross income" to include many items, but Section 6013(e)(1)(A) requires only that we look to those items actually "stated in the return".

2. Or the very last page of the Appellee's Brief, page 33, he cites Regulation 1.6013-5. That regulation was adopted on August 5, 1974 by T. D. 7320 after the parties had argued this case before Commissioner Johnson of the Tax Court. The taxpayer Bebe Klein takes the position that this regulation cannot have an ex post facto application to her. The taxpayer is unaware of any precedent where a government agency has been allowed to adopt a regulation after an issue to which the regulation relates has been raised in litigation to defeat the other party to the litigation.

In addition, taxpayer takes the position that this regulation is in direct conflict with the plain language of the statute, specifically Section 6013(e)(2)(B) to the extent that it defines gross income stated in the return to be "determined in a manner provided by Section 6501(e)(1)(A) of the Code" since Section 6013(e)(2)(B) requires that we look at Section 6501 to determine the amount of the "omission" only and not that we also

look at 6501 to determine the amount of gross income stated in the return. Accordingly, the regulation should be disregarded for the reasons already discussed in the taxpayer's initial Brief.

3. On pages 20 and 21 of Appellee's Brief he argues that the position urged here by taxpayers would discriminate against "innocent spouse[s] of sole proprietors since Schedule C of Form 1040 requires sole proprietors to report the gross sales of their business directly on their joint income tax returns". Schedule E of the Form 1040 only requires a partner to report his distributive share of the net income. The answer of Appellee is very simple. The Congress can eliminate the different treatment by either changing the language of Section 6013(e) (1) (A) to read "gross income as defined under the Internal Revenue Code" or "gross income as stated on the returns" or by changing Section 6013(e) (2) (B) to specifically incorporate Section 6501 in connection with the definition of the term "gross income stated in the return". The IRS can also eliminate the different treatment by changing Schedule E to include a column for the gross receipts of the partnership. Then the gross income will be stated on the return.

Respectfully submitted,

Dated: March 9, 1976

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CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this brief has been made on Scott P. Crampton, Assistant Attorney General, Tax Division, Department of Justice, Washington, D. C. 20530, by mailing these two copies to him on this 10 day of March, 1976, in an envelope with postage prepaid, properly addressed to him, at the above address.

*Paul M. [unclear]*